

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ACS Wireless License Sub, Inc., and)	WT Docket No. 12-_____
)	
ACS of Anchorage License Sub, Inc.)	
)	
Application for Assignment of License to)	
The Alaska Wireless Network, LLC)	

PETITION FOR DECLARATORY RULING

Pursuant to Section 1.2 of the Commission’s rules, ACW Wireless, Inc. (“ACS Wireless”), ACS Wireless License Sub, Inc. (“ACS Wireless License Sub”), and ACS of Anchorage License Sub, Inc. (“ACS of Anchorage License Sub”) (together with ACS Wireless and ACS Wireless License Sub, “ACS”) and GCI Communication Corp. (“GCI”) and Unicom, Inc. (“Unicom”) hereby seek a ruling from the Commission that, following their contribution of network facilities and spectrum licenses to The Alaska Wireless Network, LLC (“AWN”), an entity that ACS Wireless and GCI will jointly own, (i) ACS Wireless and GCI as eligible telecommunications carriers (“ETCs”) will continue to provide services over their “own facilities” for purposes of Section 214(e) of the Communications Act of 1934, as amended (the “Act”) and the Commission’s rules, and (ii) both ACS Wireless and GCI will continue to have access to the spectrum that will be licensed to and managed by their facilities-sharing joint venture.

Background: The “Proposed Transaction”

Concurrently herewith, ACS and GCI are submitting applications for Commission approval under Section 310(d) of the Act for assignment of certain wireless licenses to

AWN, a newly created entity that ACS Wireless and GCI will jointly own. As explained more fully in those applications, ACS Wireless and GCI both provide commercial mobile radio services (“CMRS”) in various locations in Alaska over their own network facilities. Both ACS Wireless and GCI are designated as competitive wireless ETCs (“CETCs”) across much of Alaska for both the high-cost and low-income universal service support programs.¹ Upon regulatory approval, ACS, GCI and Unicom will contribute substantially all of their wireless infrastructure and associated Title III authorizations to AWN (the “Proposed Transaction”). This infrastructure sharing arrangement will allow both ACS Wireless and GCI to continue operating as retail competitors with the same Alaska customer bases they have prior to closing. No retail customers will be transferred to the joint venture, nor will any service be discontinued. The parties have agreed that the current retail service plans of both ACS Wireless and GCI, including their Lifeline offerings, will be supported by AWN for at least two years, so ACS Wireless and GCI

¹ ACS Wireless is designated as a CETC in the service areas of the following incumbent local exchange carriers (“ILECS”): ACS of Anchorage, ACS of Fairbanks, ACS of Alaska (Juneau and Greatland study areas), ACS of the Northland (Glacier State study area), Alaska Telephone Company, Copper Valley Telephone Cooperative, Ketchikan Public Utilities, and Matanuska Telephone Association. Following closing of the Proposed Transaction, ACS plans to seek CETC designation in additional parts of the state. GCI is designated as a CETC in the following ILEC study areas: Adak Telephone Utility, ACS of Anchorage, Arctic Slope Telephone Association Cooperative, Bristol Bay Telephone Cooperative, Copper Valley Telephone Cooperative, Cordova Telephone Cooperative, ACS of Fairbanks, ACS of the Northland (Glacier State and Sitka study areas), Interior Telephone Company, ACS of Alaska (Juneau and Greatland study areas), Ketchikan Public Utility, Matanuska Telephone Association, Mukluk Telephone Company, Alaska Telephone Company, Nushagak Electric and Telephone, OTZ Telephone Cooperative, United Utilities, and Yukon Telephone Company. The only ILEC study areas in which GCI is not designated as a wireless CETC are Summit, Bettles, Bush-Tel, North Country, and Circle.

will be able to continue providing wireless services to their existing customers under the same terms and conditions in effect prior to the closing.

At closing, following regulatory approval, certain FCC wireless authorizations held by ACS License Sub and ACS of Anchorage License Sub and associated network facilities will be assigned to ACS Wireless, and immediately thereafter assigned by ACS Wireless to AWN in exchange for an equity interest in AWN of 33 and one-third percent. Likewise at closing, certain FCC wireless authorizations held by GCI and Unicom and associated network facilities will be assigned to a newly formed entity, GCI Wireless Holdings, LLC, which will immediately contribute those assets to AWN in exchange for an equity interest in AWN of 66 and two-thirds percent.

Following the closing, AWN will own, or have the right to use, all of the cell site and tower infrastructure currently used by either ACS Wireless or GCI to provide wholesale commercial wireless services in Alaska, including voice and broadband CMRS and public Wi-Fi services. As of the closing, AWN will have sufficient capacity to meet the projected bandwidth demands of both ACS Wireless and GCI for the next five years. ACS Wireless and GCI will purchase all of their CMRS voice, wireless broadband, and public Wi-Fi services from AWN on a wholesale basis. Consistent with Section 254(e) of the Act, any high-cost support received by ACS Wireless or GCI as wireless CETCs for the deployment of basic or advanced wireless voice or broadband services or infrastructure in Alaska, will be remitted to AWN for investment in and operation of the combined network facilities used by ACS Wireless and GCI to offer the supported services.

ACS Wireless and GCI will continue to market and sell standalone wireless voice and broadband services on a retail basis throughout Alaska, and separately brand and price their individual wireless offerings, which they may bundle with other services offered by each company or its affiliates. ACS Wireless and GCI will retain their respective retail wireless customer bases, including their Lifeline customers, and both carriers will be free to sell all types of services to existing and new customers. Both ACS Wireless and GCI are required under the Proposed Transaction to maintain their CETC designations. Either party may seek CETC designation for additional parts of the state.

As compared to the separate networks of ACS and GCI, the combined network operated by AWN will facilitate better network coverage in Alaska, a wider on-net calling footprint, greater consumer choice of services and handsets, new service plans and packages, improved wholesale services, greater resources for public safety, and enhanced spectral efficiency, all to the benefit of Alaska customers. At the same time, each of ACS Wireless and GCI will have an ownership interest in, and access to, *all* of the combined facilities and spectrum. Alaska consumers will benefit from continued retail competition between ACS Wireless and GCI, while the latter are able to more efficiently provide services, including advanced services, and remain competitive with larger carriers serving the state.

Requested Ruling

ACS and GCI hereby request that the Commission rule that, under the Proposed Transaction, through their joint ownership of AWN and their long-term contractual rights to use AWN's spectrum, facilities and services:

- each of ACS Wireless and GCI will have “access” to AWN’s spectrum, as contemplated in Section 54.1003(b) of the Commission’s rules, to qualify for Mobility Fund universal service support; and
- each of ACS Wireless and GCI will continue to provide covered wireless services over their “own facilities” as required under Section 214(e)(1)(A) of the Act, for purposes of qualifying as ETCs for high-cost and low-income universal service support.²

ACS and GCI also request any additional rulings the Commission deems necessary or appropriate to remove any doubt about the CETC designation of both ACS Wireless and GCI under the arrangements described herein and in the related Section 310(d) applications.

Discussion

Continued receipt of high-cost support is essential to the operation, maintenance and upgrade of the network by AWN, post-closing, and continued CETC status is necessary for ACS Wireless and GCI to continue providing Lifeline services to low-income customers. The requested declaratory rulings will help ensure uninterrupted service in high-cost areas and to Lifeline customers currently served by ACS Wireless or GCI. Commission precedent supports the requested rulings, as discussed below.

I. FACILITIES SHARED THROUGH AWN WILL BE BOTH GCI’S AND ACS WIRELESS’S OWN FACILITIES UNDER 214(e)(1)(A).

The Proposed Transaction will join the networks of ACS Wireless and GCI, but the two carriers will remain separate CETCs. ACS Wireless and GCI will contribute network facilities and spectrum to AWN, but each will remain wholly responsible for

² See 47 C.F.R. §54.201(a). While providing service via an ETC’s “own facilities” no longer is required for low-income support, provided certain conditions are met to qualify for forbearance, ACS and GCI will continue through AWN to have their “own facilities” and thus should not need to rely on that forbearance. *See Lifeline and Linkup Support*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, ___ FCC Rcd ___ ¶ 368 (rel. Feb. 6, 2012).

serving its own customers, including meeting its universal service obligations. The Commission should find that all network facilities contributed to AWN by the two joint venture partners, as well as facilities that AWN subsequently acquires, will belong to GCI and ACS Wireless, through their joint ownership of AWN, as their “own facilities” for the purposes of Section 214(e)(1)(A).

It is indisputable that these facilities pre-transaction are the “own facilities” of the respective contributing companies, and thus permit both GCI and ACS Wireless to be designated as CETCs pursuant to Section 214(e) with respect to their Alaskan wireless operations. It would be perverse for the Commission to conclude that these facilities ceased being GCI’s and ACS Wireless’s “own” facilities – and thus stripping GCI and ACS Wireless of their CETC status for wireless services – simply because these facilities were transferred into a jointly-owned corporate entity, allowing them to be shared and used more efficiently by both owners of AWN, for the benefit of Alaska consumers. In fact, ACS Wireless and GCI have entered into a Facilities and Network Use Agreement pursuant to which both will have access to the entire AWN network of combined facilities and licenses, including any facilities added during the term of the joint venture, in perpetuity.³

The Commission should declare that these jointly-owned facilities will be the “own facilities” of both GCI and ACS Wireless, and that any new facilities constructed also will be jointly GCI’s and ACS Wireless’s “own” facilities, for the purposes of Section 214(e)(1)(A). As the Commission has previously observed:

³ The petitioners would provide the Facilities and Network Use Agreement upon request by the staff, but would request confidential treatment due to the commercially sensitive nature of that agreement.

“the word ‘own’ – as well as its numerous derivations – is a ‘generic term’ that ‘varies in its significance according to its use’ and ‘designate[s] a great variety of interests in property. The word ‘ownership’ is said to ‘var[y] in its significance according to the context and the subject matter with which it is used.’ The word ‘owner’ is a broad and flexible word, applying not only to legal title holders, but to others enjoying the beneficial use of property. *Indeed, property may have more than one ‘owner’ at the same time, and such ‘ownership’ does not merely involve title interest to that property.*”⁴

Here, although neither GCI nor ACS Wireless would have direct title to the facilities being transferred (although in the cases of IRUs granted to AWN, the granting party would retain title over the physical facilities), GCI and ACS Wireless each will have an ownership interest in *all* of AWN’s facilities. Their equity ownership interests in AWN equal one hundred percent between GCI and ACS Wireless. In addition, both GCI and ACS Wireless will enjoy long-term contractual rights that preserve both companies’ interest in the network and the services provided.⁵

Each of GCI’s and ACS Wireless’s post-transaction ownership interests in the facilities contributed or subsequently acquired by the facilities-sharing company is at least as substantial as the interests in unbundled network elements (“UNEs”) that are held by competitive local exchange carriers, which the Commission has long found constitute “own facilities” for the purposes of Section 254(e)(1)(A). Unlike UNEs, the wireless

⁴ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8865 ¶158 (1997) (“*Universal Service First R&O*”) (subsequent history omitted) (emphasis added).

⁵ There are more than twenty events and activities that require the approval of both ACS Wireless and GCI, giving ACS Wireless significant minority investor protections to ensure that its interests in the network, the services and the licenses cannot be materially impaired. Mutual consents are required, *inter alia*, for any substantial disposition of assets by AWN, whether facilities were conveyed to AWN by ACS Wireless or GCI or constructed by AWN post-closing; for AWN to offer third parties access to the network or services offered by AWN; and for the discontinuance of any service by AWN.

facilities at issue here will have been owned in full by either GCI or ACS Wireless prior to the transaction, rather than simply being leased for a term. Once contributed to AWN, the facilities will continued to be owned, albeit through the joint venture, and will be available on an equal and non-discriminatory basis to both ACS Wireless and GCI. Through the combination of transaction documents, GCI and ACS Wireless collectively and individually retain the use of these facilities “for a period of time” – far longer than the usual term of an interconnection agreement.⁶

Moreover, the direction taken by the Commission in the *USF/ICC Transformation Order* with respect to universal service support necessitates a flexible interpretation of what constitutes a carrier’s “own facilities.” The Commission has made clear that it is transitioning all high-cost support for mobile services into funds that will, subject only to limited exceptions, support only a single network provider per area.⁷ Moreover, it will not be providing support in areas that have unsubsidized service.⁸

To be able to compete with large national carriers that are focusing on the higher density, easier-to-serve parts of Alaska, while at the same time continuing to expand services into the less dense, harder-to-serve areas, both ACS Wireless and GCI need to find ways to become more efficient in upgrading services in the urban areas, and at the

⁶ See *Universal Service First R&O*, 12 FCC Rcd at 8865 ¶158.

⁷ See *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking in WC Docket Nos. 10-90 *et al.*, 26 FCC Rcd 17663, 17779 ¶ 316 (“We decline to adopt the structure of the current competitive ETC rules, which provide support for multiple providers in an area.”) (2011) (“*USF/ICC Transformation Order*”); *id.*, 26 FCC Rcd at 18073 ¶ 1136 (“We expect that to maximize coverage within our budget we will generally be supporting [through Mobility Fund Phase II] a single provider for a given geographic area.”).

⁸ *Id.*, 26 FCC Rcd at 18070 ¶ 1124 (“[A]ny census block where 3G or better service is available from at least one unsubsidized provider would not be eligible for support.”).

same time to adapt their network operations in the areas that will need universal support to conform with the “one-supported-carrier-per-area” structure being implemented for high cost universal service. The Proposed Transaction allows them to do that with respect to services in both urban and rural areas. The proposed network sharing arrangement represents the best way to combine underlying networks into a single network that can receive mobile universal service support and deploy mobile universal service networks, while at same time preserving retail competition in rural areas to the extent possible.

Consistent with the requirement that high-cost universal service support be used “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended,”⁹ the Commission may establish as a condition of this declaration that GCI and ACS Wireless remit to AWN all high-cost support received for their provision of wireless services. GCI and ACS already are contractually committed to do so. To facilitate this, the Commission may direct USAC to establish direct payment of both GCI’s and ACS Wireless’s high-cost wireless CETC support to AWN.¹⁰

At the same time, neither the proposed declaration nor the Proposed Transaction permits either ACS Wireless or GCI to evade their responsibilities under the Act or the Commission’s rules. As CETCs, ACS Wireless and GCI will be fully accountable to the FCC, and subject to audit and examination as necessary. To the extent USAC needs information from AWN, the transaction documents require AWN to supply that information to its CETC parents. At the same time, AWN is contractually required to

⁹ See 47 U.S.C. § 254(e).

¹⁰ Consistent with the purpose of the low-income program, ACS Wireless and GCI will retain low-income support and use it to reduce the bills they charge to their respective low-income customers.

indemnify its parent CETCs for any errors or omissions that AWN makes with respect to universal service. This means that AWN must use due care when assisting its CETC parents with the preparation of high-cost line counts and any other required reports, or when responding to any audits. Similarly, however, because the CETC parents retain responsibility for their own acts or omissions, as well as overall responsibility to the Commission, both GCI and ACS Wireless must continue to ensure that their line count filings are accurate and that they take all necessary and reasonable steps to comply with the Commission's rules, and to cooperate with any audits or investigations.

GCI and ACS Wireless therefore respectfully ask the Commission for a declaration that the network transmission and switching facilities contributed by either of them to AWN under this facilities-sharing arrangement, as well as facilities subsequently acquired by AWN, will be deemed GCI's and ACS Wireless's "own facilities" for the purposes of Section 214(e)(1)(A).

II. THE COMMISSION SHOULD MAKE CLEAR THAT ACS WIRELESS AND GCI CONTINUE TO HAVE "ACCESS TO SPECTRUM" FOR THE PURPOSES OF 47 C.F.R. § 54.1003(b).

Just as AWN's facilities constitute each carrier's "own facilities" for the purposes of Section 214(e)(1)(A), so too should both ACS Wireless and GCI be considered to have "access to" AWN's spectrum following the closing, for the purposes of 47 C.F.R. §54.1003(b), and any similar provisions that the Commission may adopt with respect to Phase II Mobility Fund or other high-cost support mechanisms for wireless services established by the Commission. Although AWN will hold the spectrum licenses, both ACS Wireless and GCI will have equal access to and beneficial use of the entirety of the combined spectrum, through the Facilities and Network Use Agreement described above.

Both GCI and ACS Wireless will have had actual control of their spectrum assets prior to entering into the Proposed Transaction. The Parties will contribute licenses to AWN so that the licenses can be more efficiently utilized by both companies to provide universal mobile services, including creating a path for upgrade to 3G and 4G services where backhaul networks permit. It would be unreasonable to deem either ACS Wireless or GCI to be without “access” to this spectrum as a result of a transaction designed to *improve* the combined spectrum access and utilization by both those same parties.

Accordingly, the Commission should declare that access by ACS Wireless and GCI to AWN’s facilities and services under the Facilities Use Agreement constitutes “access to spectrum” in areas in which AWN holds Licenses, for the purpose of 47 C.F.R. §54.1003(b) and any similar provisions with respect to Mobility Fund Phase II or future high-cost support mechanisms for wireless services that the Commission may establish.

Conclusion

For the foregoing reasons, the applicants ask the Commission to promptly grant the requested declaratory rulings, which are consistent with FCC precedent, and will yield benefits for consumers in Alaska.

Respectfully submitted,

/s/

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